SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1390

PETER DORNAU, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition
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(4047)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

PETER DORNAU, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Peter Dornau respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion and order of the District Court for the Southern District of New York dismissing an indictment of the Petitioner, is reported at 359 F.Supp. 684 and is set forth in Appendix A. The opinion of the Court of Appeals reinstating the indictment is not yet reported and appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered January 24, 1974 (App. C) and its mandate has not issued. On February 12, 1974, Mr. Justice Marshall extended the time to file this petition to March 15, 1974. This Court's jurisdiction is invoked under 28

U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the federal government, in its preparation and conduct of a criminal trial to take place after the amendment of Section 7(a) of the Bankruptcy Act (which prohibits direct or indirect use of compelled testimony secured in bankruptcy proceedings), may use evidence obtained from the defendant's testimony secured under Section 7(a) before the date of the amendment.

2. Whether Section 7(a) of the Bankruptcy Act, if it allows the federal government to use evidence obtained from testimony compelled from the defendant, violates the Fifth Amendment privilege against self-incrimination.

3. Whether the United States can appeal, in a prosecution instituted before the effective date of the current Criminal Appeals Act, from an order of dismissal based on a finding of immunity under the Bankruptcy Act.

THE CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Fifth Amendment of the Constitution:

No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;***.

Section 7 of the Bankruptcy Act, 11 U.S.C. §25, prior to 1970 amendment:

(a) The bankrupt shall *** (10) *** submit to an examination ***; but no testimony given by him shall be offered in

evidence against him in any criminal proceeding ***.

(b) Where the bankrupt is a corporation, its officers *** or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

Section 7(a) of the Bankruptcy Act, 11 U.S.C. §25(a), as amended October 15, 1970, effective December 14, 1970:

The bankrupt shall *** (10) *** submit to an examination ***; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding ***.[1]

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[1] The underscored words are the words added by the amendment.

Criminal Appeals Act, 18 U.S.C. §3731 (prior to 1971 amendments):

***

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.***

STATEMENT OF THE CASE

From its enactment in 1898 until 1970, Section 7(a) of the Bankruptcy Act provided that testimony secured at the first meeting of creditors and in certain other bankruptcy proceedings from a bankrupt, or

a designated officer or agent of a bankrupt, could not be offered in evidence against the witness in any criminal proceeding. There was doubt, however, whether any immunity short of immunity from prosecution was constitutionally sufficient to protect a witness who was compelled to give testimony, from self-incrimination. With the single exception of Section 7(a) of the Bankruptcy Act, every one of the more than forty federal immunity statutes enacted between 1892 and 1970 granted the witness immunity from prosecution on account of any matter mentioned in his testimony.[2]

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[2] See Counselman v. Hitchcock, 142 U.S. 547; Brown v. Walker, 161 U.S. 591; Adams v. Maryland, 347 U.S. 179, 182-183; and Piccirillo v. New York, 400 U.S. 548, 571 and n. 11 (dissenting opinion of Mr. Justice Brennan).

Congress amended the Bankruptcy Act effective December 14, 1970, to "eliminate *** constitutional objections" and to avoid "future court challenge" of Section 7(a) and other immunity provisions (H. R. Rep. No. 1549, 91st Cong., 2d Sess., p. 1). Under the amendment of Section 7(a) of the Act, no testimony "or any evidence which is directly or indirectly derived from such testimony" can be offered in evidence against the witness in any criminal proceeding (11 U.S.C. §25(a)(10); P.L. 91-452, Oct. 15, 1970, 84 Stat. 929).

Petitioner Peter Dornau (hereafter referred to as Dornau) was vice president of Ra-Dor Industries, Inc. (Ra-Dor), a corporation adjudicated a bankrupt. In May 1969, — before the statutory amendment — Dornau was ordered by a bankruptcy court

to appear as a witness at the first meeting of Ra-Dor's creditors in Tampa, Florida. The order of the bankruptcy court, entered pursuant to Section 7(b) of the Bankruptcy Act, designated Dornau as an officer of Ra-Dor required to perform the duties of the bankrupt (see Government Exhibit 13, pages 1, 11, in the Record filed in this Court).

When Dornau appeared before the Court, his counsel reminded the bankruptcy referee of his order compelling Dornau's attendance, and the referee advised Dornau of the privilege against self-incrimination and the doctrine of waiver. Counsel then said it was Dornau's position that under Section 7(a)(10) of the Bankruptcy Act, the testimony he would give, and "any evidence which is found as the result of testimony,"

could not be used against him. The referee responded, "7-A-10 grants immunity to an officer who, by virtue of the provisions of the Act, is compelled to come to Court and testify. That applies to the Bankrupt himself and in the case of a corporation, to an officer thereof." Dornau thereupon testified about the affairs of Ra-Dor in the presence of representatives of the federal government (Exh. 13, pp. 21-24).

The federal government started an investigation of Ra-Dor in 1968, before Dornau was required to testify in the bankruptcy proceeding. Thereafter, in the summer of 1969, the government decided to present the case to a grand jury in New York. The prosecutor in charge of the investigation obtained the transcripts of Dornau's testimony in the bankruptcy

proceeding. The prosecutor read Dornau's testimony in August or September 1969, — before he presented any evidence to the grand jury respecting an alleged scheme to defraud investors in Ra-Dor, with which Dornau was subsequently charged. There are nearly fifty places in the bankruptcy transcripts where the prosecutor made notes indicating testimony of interest to him (A12-13).[3] In October 1969, Dornau was indicted in the Southern District of New York for mail fraud and wire fraud, 18 U.S.C. §§1341, 1343. Portions of the testimony taken from Dornau under grant of immunity in the bankruptcy proceeding related to the subject matter of the indictment and the

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[3] Numbers following the letter A are references to pages of the Appendices to this Petition.

government's case (A13-15).

At a pre-trial hearing, the government was called upon to show and failed to show, as required by Kastigar v. United States, 406 U.S. 441, that all of its evidence of fraud came from sources other than testimony compelled from Dornau in the bankruptcy proceeding. On Dornau's motion, the indictment was dismissed (A4-6, 15, 17). The District Court's ruling was not limited to the evidence presented to the grand jury, and included the evidence the government intended to use on the trial.[4]

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[4] Cf. United States v. Calandra, ___U.S.___, 42 U.S. Law Week 4104. There is a dictum in Calandra to the effect that an indictment based on compelled testimony is valid (at 4106). However in Calandra the Court distinguished the use of illegally obtained evidence in the context of a criminal trial, and re-affirmed the constitutional rule that evidence derived from illegally obtained evidence may not be used in the trial context (at 4109).

The Court held, on the authority of Kastigar v. United States, that dismissal of the case was necessary because the government failed to establish that coerced testimony was not used "in any respect". The scope and strength of the case against Dornau could have been enhanced by knowledge derived from the prosecutor's reading of the coerced testimony. At least the contrary was not shown (A4-6, 13-17).

It may fairly be inferred that the government used the coerced testimony indirectly to secure the indictment, or intended to use it upon the trial of the case. The government was free, when the indictment was dismissed, to seek a re-indictment by presenting independently derived evidence to a different grand jury. At a conference between the Judges of the Court

of Appeals and counsel, the Judges of the Court suggested that the government follow that course and moot its appeal from the dismissal of the indictment. The government did not follow the suggestion. It may be inferred from the government's failure to seek a new indictment, that it was not able to proceed without using the coerced testimony.

The Court of Appeals reinstated the indictment on the sole ground, not raised below, that the only protection Dornau received when ordered to appear as a witness in the bankruptcy proceeding, was that the transcripts of his testimony could not be read to the grand jury that indicted him, and could not be offered in evidence at his trial.[5] The Court of Appeals

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[5] The government did not read the bankruptcy testimony to the grand jury and stated that it did not intend to read the testimony into evidence on the trial.

said Dornau obtained only that very limited protection because he testified prior to the amendment of Section 7(a) of the Bankruptcy Act prohibiting use of evidence directly or indirectly obtained from testimony secured under that Section (A25-28).

Dornau argued that Section 7(a) of the Act is unconstitutional under Kastigar v. United States, 406 U.S. 441, if interpreted to allow use of evidence obtained from a defendant's testimony in a case not reached for trial when Kastigar was decided. The Court said Kastigar did not apply because the bankruptcy referee did not have power to compel testimony prior to the statutory amendment, and Kastigar applies to compelled testimony only (A27, n. 13).

REASONS FOR GRANTING THE WRIT

1. The Second Circuit's Interpretation of the Immunity Provision of the Bankruptcy Act Is in Conflict With the Fifth Circuit's Interpretation of the Same Provision.

The Court of Appeals, in determining that Dornau received nothing more than protection against the reading of his testimony into evidence, acknowledged that its decision is in conflict with United States v. Seiffert, 463 F.2d 1089 (5th Cir.) (A28). In Seiffert the Court held that the amendment of Section 7(a) of the Bankruptcy Act was applicable to all cases pending on the effective date of the amendment and conferred the broader protection upon the defendant who testified in a bankruptcy proceeding, and was indicted, before the effective date. 463 F.2d at 1091-1092. On the

remand in Seiffert, the trial Court found that none of the government's evidence was derived from the defendant's testimony. The Fifth Circuit heard argument on the second appeal in Seiffert on February 5, 1974.

A different panel of the Fifth Circuit and the District Court for Connecticut have held that Section 7(a) of the Act merely grants protection against the reading of testimony into evidence, to defendants who testified before the statute was amended. United States v. Goodwin, 470 F.2d 893, cert. denied, 411 U.S. 969; United States v. Filiberti, 366 F.Supp. 1062. However the defendants in Goodwin and Filiberti, unlike Dornau, apparently did not claim immunity in the bankruptcy proceeding.

As the immunity provision of the

Bankruptcy Act was amended to broaden the scope of immunity and to eliminate constitutional problems (see page 8 of this Petition), it is unlikely that Congress intended to allow direct or indirect use of compelled testimony after the effective date of the amendment. Certainly there is nothing in the terms of the amendment, curative in purpose, to suggest so anomalous, and constitutionally questionable, a result. See Smallwood v. Gallardo, 275 U.S. 56, 61, and Ullman v. United States, 350 U.S. 422, 433.[6]

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[6] The District Court did not, in the instant case, dismiss the indictment on the ground that the government may have made direct or indirect use of Dornau's testimony in the proceedings before the grand jury in 1969, i.e., prior to the statutory amendment. The Court's inquiry focused initially upon whether the indictment was based on compelled testimony. The inquiry "was broadened to include evidence the government proposed to use on the

2. The Case Presents an Important Question under the Fifth Amendment of the Constitution and the Decision Below on the Constitutional Question is Inconsistent with the Prior Decisions of This Court.

In 1972, the Court held in Kastigar v. United States, 406 U.S. 441, that immunity from prosecution is not required by the Fifth Amendment privilege against self-incrimination, provided that the government does not use testimony given by the defendant under a grant of immunity "in any

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trial" (A4). The Court found that the government could have used Dornau's testimony in a variety of ways prior to and at the trial (after the effective date of the amendment) (A13-15). In United States v. McDaniel, 482 F.2d 305 (8th Cir.), the Court found that the reading, prior to indictment, of defendant's compelled testimony could have helped the government interpret evidence and plan its trial strategy and cross-examination, — long after the indictment was returned. 482 F.2d at 311.

respect" (the Court's emphasis). If a witness testifies under grant of immunity and is subsequently prosecuted, there is a "total prohibition" on direct or indirect use of his testimony, — a "comprehensive safeguard" imposing on the government "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 453, 460-462.

The constitutional protection articulated in Kastigar v. United States undoubtedly applies to cases not yet tried on the date of the decision. Cf. Eskridge v. Washington State Board, 357 U.S. 214; Linkletter v. Walker, 381 U.S. 618, 622, n.4; O'Connor v. Ohio, 385 U.S. 92, 93; Witherspoon v. Illinois, 391 U.S. 510, 523, n.22; Roberts v. Russell, 392 U.S. 293; McConnell v.

Rhay, 393 U.S. 2; Arsenault v. Massachusetts, 393 U.S. 5; Berger v. California, 393 U.S. 314; Price v. Georgia, 398 U.S. 323, 330, n. 9; Kitchens v. Smith, 401 U.S. 847; Ivan V. v. City of New York, 407 U.S. 203; Robinson v. Neil, 409 U.S. 505. The District Court did not rule on the immunity claim in the instant case until more than a year after Kastigar was decided, and the Court's ruling was on a pre-trial motion to dismiss.

The Second Circuit held that Dornau was not entitled to the protection mandated by Kastigar v. United States, 406 U.S. 441, because he did not invoke the privilege against self-incrimination in the bankruptcy proceeding and the bankruptcy referee could not have compelled Dornau to testify if he had claimed the privilege (A27,

n. 13). The Court's decision is at variance with prior decisions of this Court indicating that a witness's testimony cannot be used against him if given in coercive circumstances, regardless of whether the Fifth Amendment privilege was claimed. Garrity v. New Jersey, 385 U.S. 493; Adams v. Maryland, 347 U.S. 179. See also Simmons v. United States, 390 U.S. 377, 389-394; Katz v. United States, 389 U.S. 347, 349, n. 3; Spevack v. Klein, 385 U.S. 511; Slochower v. Board of Education, 350 U.S. 551; Fowler v. Vincent, 366 F. Supp. 1224, 1227-1228 (S.D.N.Y.).

Moreover, when a statute, such as Section 7(a) of the Bankruptcy Act, confers immunity automatically, without any action by the prosecutor or a judge, it would appear that the witness need not invoke the

privilege to obtain immunity. Adams v. Maryland, 347 U.S. 179, 181-182; United States v. Monia, 317 U.S. 424, 426-427; United States v. McDaniel, 482 F.2d 305, 309-310 (8th Cir.); People v. Dinora, 13 Ill.App.3d 99, 200 N.E.2d 797, 802.

This Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights," Johnson v. Zerbst, 304 U.S. 458, 464, including the privilege against self-incrimination, Emspak v. United States, 349 U.S. 190, 197-198; Smith v. United States, 337 U.S. 137, 150. It is doubtful that Dornau waived the constitutional guarantee when he claimed immunity, and the interrogator said that the Bankruptcy Act conferred immunity, before Dornau began to testify (Exh. 13, p. 24). In the circumstances, surely Dornau was not required to

suffer a conviction for contempt for refusing to answer the questions, as a prerequisite to the vindication of his constitutional right.[7]

Dornau will also argue, if the writ is granted, that the government did not have a right of appeal from the order of the District Court dismissing the indictment. The 1948 version of the Criminal Appeals Act (18 U.S.C. §3731), which governs appeals

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[7] Arndstein v. McCarthy, 254 U.S. 71, cited by the Second Circuit in support of its ruling, did not hold that a witness waives the Fifth Amendment protection by testifying in a bankruptcy proceeding. The Court decided in Arndstein v. McCarthy that the immunity granted by Section 7 of the Bankruptcy Act before it was amended, was not co-extensive with the constitutional protection. 254 U.S. at 73. Thus the witness was justified in refusing to answer and his contempt conviction was reversed. The determination in Arndstein that a witness may refuse to testify, is not authority for the proposition that he must refuse to testify to preserve his rights.

in prosecutions instituted before the 1971 amendment of the Act, has been consistently construed against a right of appeal by the government. United States v. Weller, 401 U.S. 254, 255 and n. 1; United States v. Sisson, 399 U.S. 267, 286, 291 et seq.; Will v. United States, 389 U.S. 90, 97, n. 5; Carroll v. United States, 354 U.S. 394, 400.

The District Court based its dismissal order on facts other than those alleged in the indictment, and the order was not based on a defect in the indictment or institution of the prosecution. It would appear, accordingly, that neither the Court of Appeals nor this Court had jurisdiction of the government's appeal. United States v. Sisson, 399 U.S. 267, 298; United States v. Brewster, 408 U.S. 501, 506;

United States v. Rothfelder, 474 F.2d 606, 608 (6th Cir.), cert. denied, 413 U.S. 922; United States v. Hill, 473 F.2d 759 (9th Cir.); United States v. Ponto, 454 F.2d 657, 663-664 (7th Cir.); United States v. Findley, 439 F.2d 970, 974 (1st Cir.).

There have now been four reported cases dealing with the issues raised in this petition: United States v. Goodwin, 470 F.2d 893, cert. denied, 411 U.S. 969, United States v. Filiberti, 366 F.Supp. 1062, the instant case, and United States v. Seiffert, 463 F.2d 1089, in which the Fifth Circuit's decision on the second appeal is expected shortly. The questions are important, and the writ should be allowed, in view of the substantial constitutional issue, the conflict in the decisions of the lower courts, and

the apparent inconsistency between the decision below and the prior decisions of this Court.

For the reasons outlined, a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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FRANKLIN S. BONEM
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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

FRED R. DORNAU
PETER DORNAU, and
RA-DOR INDUSTRIES, INC.,

Defendants.

- x

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METZNER, District Judge:

A hearing was held on defendants' motion to dismiss the indictment because allegedly it was founded on testimony given by defendants in bankruptcy proceedings in Florida pursuant to a grant of immunity. Section 7a(10) of the Bankruptcy Act (11 U.S.C. § 25).

The indictment against these defendants contains 45 counts. The first 29 counts concern only defendant Fred Dornau and charge him with defrauding the government by filing false invoices (18 U.S.C. § 287). Count 30 charges this same defendant with uttering and publishing as true a forged government contract (18 U.S.C. § 494). Counts 31 through 41 charge both Fred Dornau and his brother Peter Dornau with mail fraud (18 U.S.C. § 1341). Counts 42 through 45

charge both defendants with wire fraud (18 U.S.C. § 1343).

On March 2, 1973 this court granted defendants' motion to inspect the grand jury minutes for the purpose of determining whether the indictment may have been impermissibly based on the testimony the defendants gave under the grant of immunity. ___F. Supp.___ (S.D.N.Y. 1973). Subsequently, the court denied the government's motion for reargument in which it had requested that the court review the grand jury minutes in camera, or, in any event, postpone any hearing until after the completion of the trial. ___F. Supp.___, supra. The defendants were given until May 3 to examine the grand jury minutes and to move to dismiss the indictment if they were of the opinion that their immunity had been violated.

May 30 had already been fixed as the trial date.

After reading the minutes, defendants moved for a hearing in order to determine whether the government had made any use of the privileged testimony of either of the defendants or of any evidence directly or indirectly derived therefrom. The hearing was then held at which time the inquiry was broadened to include evidence the government proposed to use on the trial. This course was dictated by language in the Kastigar case, discussed more fully later in this opinion. At the conclusion of the hearing defendants moved to dismiss the indictment.

The immunity granted by Section 7a(10) of the Bankruptcy Act is similar in language and scope to the immunity granted

by 18 U.S.C. § 6002. It is commonly called use or derivative use immunity. The starting point for the discussion of the issues here is the decision in Kastigar v. United States, 406 U.S. 441 (1972), which dealt with Section 6002. There the Court held that the scope of any immunity grant must be coextensive with a witness' Fifth Amendment privilege against compulsory self-incrimination, and that use immunity satisfies this requirement. The important point then to be considered in cases like this is whether the government's testimony would have existed if the defendant had been permitted to refrain from testifying on the assertion of his Fifth Amendment privilege. In defining the protection use immunity would afford a witness, the Court in Kastigar said:

"Immunity from the use of

> compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453.

The denial of use for any purpose, of course, includes using it as an "investigatory lead" (Id. at 460). Finally, the Court stated:

> "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." (Emphasis supplied) Id. at 461-62.

On the hearing the government produced three witnesses. They were FBI Agent Sniegocki who was based in New York in 1968 and 1969 and who conducted the investigation in conjunction with this indictment;

FBI Agent Smith of Florida who conducted a separate investigation of possible crimes committed in connection with the bankruptcy proceedings; and Mr. Kulleseid, a former Assistant United States Attorney, who handled this case through its presentation to the grand jury.

At the conclusion of the oral arguments after the hearing had been completed, I indicated that neither the grand jury testimony nor the prospective proof to be offered by the government in support of Counts 1 through 30 flowed directly or indirectly from the testimony given by Fred Dornau in the bankruptcy proceedings. His compelled testimony did not touch the issues presented by these counts. I have been fortified in this conclusion by an in camera examination, consented to by defendants, of certain material

submitted by the government. The motion to dismiss these counts is therefore denied.

We come now to Counts 31 through 45 which charge defendants with defrauding investors and lenders involved in Ra-Dor Industries, Inc. Ra-Dor primarily manufactured material in conjunction with defense contracts. The investigation of these defendants commenced in March 1968 on the complaint of the Defense Department that Ra-Dor had filed false claims in relation to government contracts held by that corporation. The interviews of witnesses by Sniegocki through December 1968 dealt solely with such an investigation, and the results thereof are contained in Counts 1 through 30. Sometime in the latter part of 1968, the FBI in Florida commenced a separate investigation of Ra-Dor regarding possible violations of

the National Bankruptcy Act. Both of these investigations continued apace with frequent exchanges of information and mutual requests for local help in New York and Florida.

Nothing of consequence was done in the New York investigation from December to May 26, 1969, at which time four investigative interviews took place within two days. These interviews were concerned with the subject matter contained in Counts 31 through 45. The crucial factor here is that the defendants testified under a grant of immunity in the bankruptcy proceedings in Florida on May 1 and 9. There was another interview on July 15, 1969, and finally two additional interviews on September 10, 1969. It is interesting to note that sometime between July 8, 1969 and August 19, 1969, the caption of the investigative reports was enlarged from

fraud against the government and the National Bankruptcy Act to include mail and wire fraud as well. Sometime between July 8 and August 4, 1969, the Assistant U.S. Attorney requested the FBI to conduct additional interviews to develop the possible mail fraud and wire fraud counts. It is impossible to pinpoint the exact date when this occurred.

It is clear from reading the files, the testimony of the defendants in the bankruptcy proceedings and the evidence in this case, that the interviews which took place beginning on May 26, 1969 did not flow from any compelled testimony by these defendants. The leads to those interviews were furnished to the FBI in Florida by Mr. Bernstein, an attorney for Ra-Dor's creditors in the bankruptcy proceeding. That information was

then transmitted to New York and received by Sniegocki on April 12, 1969. This information was accompanied by a request that New York make specific investigations of Univance, Nuclear Research, Seeger, the attorney for some of Ra-Dor's creditors in New York, and Schnepps, Ra-Dor's attorney in New York. Finally, it is clear that the prospective government witnesses on this trial, Fiala, Billich, Baer and Ray, were all discovered and interviewed without relation to anything that appeared in the minutes of the testimony. Counsel for the defendants had a month within which to compare the grand jury testimony and the compelled testimony and have not furnished the court with any leads as to what may be considered tainted evidence.

What causes the problem in this

case is that Kulleseid, on August 1, 1969, requested the United States Attorney in Florida to furnish him with the transcript of defendants' testimony in the bankruptcy proceedings. The transcript was received here on August 7. The grand jury had met on July 31 and August 4 at which time it heard testimony going only to Counts 1 through 30 of the indictment. The grand jury was then excused until August 28, when, for the first time, it heard some testimony regarding the counts with which we are concerned. The grand jury was then recessed until October 10 when it heard the bulk of the testimony regarding the mail fraud and wire fraud counts and voted the indictment.

While the recollection of Kulleseid is not clear as to exactly when he read the transcript, at least it is fair to say that the

government has failed to show that he had not read it before presenting any testimony to the grand jury on Counts 31 through 45. There are portions of the immunized testimony which relate to the subject matter of those counts. There are nearly fifty places in the transcript where Kulleseid made markings indicating questions and answers of interest to him. On the hearing he was unable (and I am sure this was a perfectly honest statement in view of the lapse of four years) to explain what the marked testimony could have meant to him either for the purpose of interrogating prospective witnesses or in presenting the case to the grand jury. In any event, there appears to be no reason why he had to read the transcript except to make sure his case was complete, or to use the testimony to buttress

what he already knew, or to fill in gaps with new information.

We have here one of the problems presented by the opinion in Kastigar. How do you make sure that a person who has testified under a grant of immunity will be protected against subsequent criminal charges to the same extent as if he had originally pleaded the Fifth Amendment? This is a matter of great concern and debate. See Note, Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli, 82 Yale L. J. 171 (1972) and The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 181 (1972). It is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the Assistant charged with the prosecution

of the case.

It appears to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor had read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur, calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them. Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964). The breadth of this ruling is justified by the language in Kastigar that the immunized testimony could not be used "in any respect."

Support for the conclusion reached here may be found in United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971),

cert. denied, 405 U.S. 992 (1972). That case relied on Murphy v. Waterfront Commission, supra. Both of the cases were concerned with interjurisdictional immunity. However, Kastigar explicitly adopted the same rule of privilege where only one sovereign is concerned. In McDaniel, the court said at 837:

> "The circumstances of this case, however, are not ordinary, for we are faced with the fact that the United States District Attorney requested and received a transcript of the compelled state testimony. We conclude that this conduct violated the defendant's Fifth Amendment rights and constitutes a prima facie 'use' of the testimony which is prohibited by the Murphy exclusionary rule."

The question of whether the remedy for this violation of defendants' constitutional rights should be by way of suppression of evidence or by dismissal was determined by

me in favor of the latter course in the prior opinion which initiated these proceedings. ___F. Supp.___, supra. After the hearing and the clarification of the fact issues involved, my original views have been confirmed that in this case dismissal is the only proper remedy. It is impossible to suppress specific evidence in the light of the problem involved.

The motion to dismiss Counts 31 through 45 is granted.

So ordered.

Dated: June 4, 1973

CHARLES M. METZNER
U. S. D. J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 350—September Term, 1973.

(Argued December 6, 1973 Decided January 24, 1974.)

Docket No. 73-2204

UNITED STATES OF AMERICA,

Appellant,

—against—

PETER DORNAU,

Defendant-Appellee.

Before:

WATERMAN and FEINBERG, *Circuit Judges*, and GURFEIN, *District Judge.**

Appeal by United States from dismissal of indictment which charged defendant-appellee with 15 counts of use of the mails and wire communications in interstate commerce in furtherance of a scheme to defraud investors in violation of 18 U.S.C. §§ 1341, 1343. The United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, dismissed the indictment because the Government failed to prove that the evidence presented to the grand jury was untainted by the prosecution's knowledge of testimony given by defendant pursuant to a grant of immunity under the Bankruptcy Act.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Reversed and remanded with instructions to reinstate the indictment.

JOHN J. KENNEY, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; John W. Nields, Jr., Assistant United States Attorney, on the brief), *for Appellant.*

FRANKLIN S. BONEM, New York, N.Y. (London, Buttenwieser & Chalif, Bonnie P. Winawer, on the brief), *for Defendant-Appellee.*

FEINBERG, *Circuit Judge:*

The United States appeals from the dismissal in the United States District Court for the Southern District of New York, by Charles M. Metzner, *J.*, of an indictment that charged appellee Peter Dornau with use of the mails and wire communications in interstate commerce in furtherance of a scheme to defraud investors in violation of 18 U.S.C. §§ 1341, 1343.[1] The basis for dismissal was that the prosecution, in presenting its case to the grand jury, may have made derivative use of testimony given by Dornau pursuant to a grant of immunity under section 7(a)(10) of the Bankruptcy Act. We hold that the order of dismissal is appealable to this court. On the merits, we further hold that Dornau received mere use immunity in the bankruptcy proceeding and that the prosecution's alleged derivative use of his testimony was not unlawful. Accordingly, we reverse and remand to the district court with instructions to reinstate the indictment.

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1 Also named as defendants in the indictment but not involved in this appeal were Fred Dornau and Ra-Dor Industries, Inc.

I

A brief history of this litigation is necessary for an understanding of the issues before us. Appellee Peter Dornau was vice-president of Ra-Dor Industries, Inc. (Ra-Dor), which manufactured materials used in defense contracts. In May 1969, he testified at the first meeting of creditors in Ra-Dor's bankruptcy proceeding in a federal district court in Florida;[2] this testimony and the circumstances under which it was given are the key facts in this appeal. Five months later, Dornau was indicted in the Southern District of New York on 15 counts of mail and wire fraud in furtherance of a scheme to bilk investors in Ra-Dor. Early in 1973, Dornau moved, among other things,[3] for an order entitling him to inspect the grand jury minutes. This relief was granted. 356 F. Supp. 1091, 1097-98. Thereafter, upon Dornau's motion, a hearing was held to determine whether the Government had made improper use of Dornau's prior testimony either in presenting evidence to the grand jury or in preparing for trial. In a thorough opinion, 359 F. Supp. 684, the judge granted Dornau's motion to dismiss the indictment.

Judge Metzner proceeded on the assumption, apparently unchallenged by the Government at that time, that Dornau's Florida testimony had been compelled pursuant to a grant, under the Bankruptcy Act, of use and derivative use immunity coextensive with the fifth amendment privilege against self-incrimination. On this assumption, the judge

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2 Apparently, Dornau had been designated under § 7(b) of the Bankruptcy Act, 11 U.S.C. § 25(b), as one of the corporate officers required to perform the duties of the bankrupt and appeared at the meeting pursuant to order.

3 Dornau also moved to dismiss the indictment because of the more than three-year post-indictment delay. Judge Metzner denied this motion, finding that much of the delay was due to the adjudication of pending charges against co-defendant Fred Dornau.

examined the intended trial evidence in light of the Supreme Court's admonition that the prosecution bears a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar* v. *United States*, 406 U.S. 441, 461-62 (1972). After careful scrutiny of the sources of this evidence, Judge Metzner ruled:

> [I]t is clear that the prospective government witnesses on this trial . . . were all discovered and interviewed without relation to anything that appeared in the minutes of the [bankruptcy] testimony.

359 F. Supp. at 686. The judge also examined for taint the evidence which the Government had presented to the grand jury. Here he found that the Assistant United States Attorney then in charge had sought, and obtained, a transcript of the bankruptcy testimony less than a month before he began to present the case to the grand jury, and had made copious notes on the transcript. Consequently, although Dornau was unable to point out any specific instance of taint, the judge dismissed the indictment, holding that the prosecutor may have made derivative use of the testimony in a variety of ways and that the Government had not met its burden of proving freedom from taint.[4]

II

The first issue before us is whether the Government can appeal from the district court's order. Since the indictment in this case was returned in October 1969, before the effective date of the current Criminal Appeals Act, 18 U.S.C.

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4 The judge declined to speculate on the precise effect reading the transcript might have had on the conduct or thinking processes of the prosecutor. The possibility of some use was held sufficient to violate the command of *Kastigar* that immunized testimony must not be used "in *any* respect." 406 U.S. at 453.

§ 3731, appealability is governed by the "elusive provisions" of the 1948 version of the Act. *United States* v. *Weller*, 401 U.S. 254, 255 & n.1 (1971); *United States* v. *DiStefano*, 464 F.2d 845, 847 (2d Cir. 1972). Despite the breadth of its language,[5] the 1948 Act has been construed to incorporate the provisions of the 1942 Act. These permit appeals to the courts of appeals only in a narrow class of cases, which includes a decision "sustaining . . . a plea in abatement. . . ."[6] Id. at 847-48; *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 751-55 (9th Cir. 1959) (en banc). We hold that the dismissal here is appealable to this court because, in effect, it sustained a plea in abatement.

The function of a plea in abatement is "to impeach the indictment . . . without at the same time destroying the cause of action." *United States* v. *Apex Distributing Co.*, supra, 270 F.2d at 753. Thus, an attack on an indictment because of a defect in the proceedings leading to its procurement, which would not necessarily end the prosecution, would be such a plea. Id. Here, Judge Metzner found that

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5 The 1948 Act provided in relevant part:

> An appeal may be taken by . . . the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

62 Stat. 845.

An appeal lies to the Supreme Court from, inter alia, a decision "sustaining a motion in bar, when the defendant has not been put in jeopardy." Id. at 844-45.

6 The 1942 Act provided in relevant part that an appeal lies to a court of appeals:

> From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act.

56 Stat. 271.

the witnesses the Government proposed to produce at trial were discovered and interviewed independently of appellee's bankruptcy testimony; the problem of taint arises only because the prosecutor read that testimony before presenting the Government's case to the grand jury. However difficult it may be to eliminate that taint, if such it was, dismissal did not necessarily terminate the cause of action. Even if dismissal was proper, the Government may be able to reindict successfully if a prosecutor, who has not read either the bankruptcy transcript or the grand jury minutes, presents the independently derived evidence to a different grand jury. See *United States* v. *Tane*, 329 F.2d 848, 851 & n.4, 852 (2d Cir. 1964) (dismissal of indictment because it was procured through the use of illegally obtained evidence did not necessarily terminate cause of action and was appealable).

Dornau, however, claims that we do not have jurisdiction over the appeal from Judge Metzner's order. Citing various decisions, e.g., *United States* v. *Brewster*, 408 U.S. 501, 506 (1972), and *United States* v. *Ponto*, 454 F.2d 657, 663-64 (7th Cir. 1971) (en banc), appellee first contends that the dismissal is not appealable at all because it is based on facts not alleged in the indictment. The district court, the argument goes, went beyond the indictment to examine the prosecution's trial evidence and concluded that the Government had failed to prove that it was untainted. The argument flies in the face of Judge Metzner's finding, quoted above, that the Government's trial evidence was not tainted. Moreover, appellee's citations do not support his contention since they deal with dismissals that necessarily determined the merits of criminal charges and had the effect of terminating the prosecution altogether. In contrast, the order here did not determine or purport to determine the merits of the charges against Dornau.

Appellee alternatively suggests that the dismissal in this case has the effect of sustaining a motion in bar and is thus appealable only to the Supreme Court. See note 5 supra. The argument is without merit. As defined by the Supreme Court, a motion in bar has the characteristics of a common law plea of confession and avoidance; at least for purposes of the motion, the movant admits his guilt but claims he is nonetheless immune from prosecution because of some extraneous factor such as a grant of transactional immunity or the expiration of the statute of limitations. *United States* v. *Weller*, supra, 401 U.S. at 259-61. As we have already held, dismissal here did not necessarily bar reindictment.[7] See *United States* v. *Tane*, supra, 329 F.2d at 851 n.4.

III

Having determined that we have jurisdiction, we would ordinarily turn directly to the Government's arguments as appellant, but before we can consider them still another preliminary question must be faced. One of the Government's principal contentions in this court[8] is that, by testifying under the 1969 version of section 7(a)(10) of the Bankruptcy Act, Dornau received only use immunity; consequently, even if the prosecution made derivative use of his testimony—which is not conceded—such use was law-

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7 *United States* v. *Blue*, 384 U.S. 251 (1966), relied upon by appellee, is not to the contrary. To be sure, the Supreme Court there found that dismissal of the indictment because of the defendant's past compulsory self-incrimination operated as the granting of a motion in bar. But the Court so found only because of the district court's erroneous ruling that the taint was so pervasive that prosecution on the same counts was forever barred. Id. at 254. In reversing, the Court noted that the defendant would at most be entitled to bar the incriminating evidence and its fruits if they were sought to be used against him at a subsequent trial. Id. at 255.

8 For other claims of the Government, see note 15 infra.

ful. Dornau argues that this issue is not properly before us because the Government did not make this point in the trial court. Dornau is apparently correct in the latter assertion. The Government seems to concede that it raised the issue of the scope of appellee's immunity only at the last moment in the district court and even then only obliquely by calling *United States* v. *Goodwin*, 470 F.2d 893 (5th Cir. 1972), which is discussed below, "to the Court's attention informally *after* the hearing and *before* the Court's opinion was filed."[9]

Nevertheless, we conclude that we should consider the Government's "scope of immunity" argument. We undoubtedly have discretion to entertain on appeal contentions not raised in the district court. *McDonnell* v. *American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1185 (2d Cir. 1972); *United States* v. *Drummond*, 354 F.2d 132, 141 n.4 (2d Cir. 1965) (en banc), cert. denied, 384 U.S. 1013 (1966). Here, the argument as it comes before us is essentially one of law; appellee points to no seriously disputed factual issues whose resolution would best be left in the first instance to the district court. Moreover, appellee's ability to litigate the "scope of immunity" issue in this court is not impaired by the Government's failure to raise it below. Finally, absent this kind of prejudice to Dornau, it is significant that the indictment charges serious crimes in whose continued prosecution the public has a strong interest. Under these circumstances, we exercise our discretion to consider the Government's argument.

Addressing ourselves, at last, to the merits, we hold that Dornau received only use immunity in the bankruptcy proceeding and that consequently the Government's alleged

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9 Reply brief for the United States, at 4 n.**. Dornau moves to strike this footnote because it relates ex parte conduct not in the record. We deny the motion, noting that we do not rely on the information in the footnote to support our decision.

derivative use of his testimony was not improper. Section 7(a)(10) of the Bankruptcy Act, as it stood in 1969, conferred only use immunity. It was so worded[10] and had been so interpreted by the Supreme Court. *Arndstein* v. *McCarthy*, 254 U.S. 71, 73 (1920); see 1A Collier on Bankruptcy ¶ 7.21 at 1013-15. Because use immunity is not coextensive with the privilege against self-incrimination, *Counselman* v. *Hitchcock*, 142 U.S. 547, 564-65 (1892), section 7(a)(10) could not have been used in 1969 to compel a bankrupt's testimony over an assertion of his fifth amendment privilege. *Arndstein*, supra, 254 U.S. at 73. Consequently,

> . . . the witness faced two alternatives under the [1969] version of the statute: he could choose to testify freely and then later claim whatever protection the statute afforded; or he could refuse to testify on the grounds that the answers sought might be incriminating.

United States v. *Goodwin*, 470 F.2d 893, 904 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973). The record in this case indicates that Dornau was informed by the referee of his constitutional right to refuse to testify,[11] and

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10 The 1969 version of § 7 (a)(10), 52 Stat. 847, provides that no testimony given by a bankrupt pursuant thereto "shall be offered in evidence against him in any criminal proceeding . . . ." There does not appear to be any question that Dornau, though not himself bankrupt, was entitled to the immunity granted by this section since he testified at the first meeting of creditors after apparently being designated as one of the corporate officers required to perform the duties of the bankrupt Ra-Dor. See note 2 supra; *United States* v. *Castellana*, 349 F.2d 264, 273-74 (2d Cir. 1965).

11 The referee told Dornau:

> Mr. Dornau, it is my duty to advise you that under the Fifth Amendment to the United States Constitution, a person cannot be compelled to give testimony which might be used against the person in prosecution for violating any laws of the United States or any State.

that, without compulsion, he nonetheless chose to testify, relying on the immunity granted by the Act. Such conduct hardly supports Dornau's claim that he received derivative use immunity.

Appellee maintains, however, that the 1969 version of section 7(a)(10) is not controlling. Noting that the section was amended in 1970 to provide use and derivative use immunity,[12] and relying on *United States* v. *Seiffert*, 463 F.2d 1089, 1091-92 (5th Cir. 1972), Dornau argues that the 1970 amendment applies to all attempts to make derivative use of bankruptcy testimony after its effective date even if the testimony was given prior thereto.[13] We

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It is my duty to advise you that you have this constitutional right and if in the course of the questioning you are of the honest belief that the answer sought to be elicited from you does or might tend to incriminate you or put you in jeopardy and that might be used against you in subsequent prosecution for violating any laws of the United States or any State thereof, then you have a constitutional right to refuse to answer.

I also have to explain to you and your counsel here what is known as the Doctrine of Waiver, that once you commence giving answers pertaining to a certain subject that you might be deemed to have waived your constitutional rights because you voluntarily commenced to answer.

12 Section 7(a)(10) currently provides that no testimony given by a bankrupt pursuant therefor "or any evidence which is directly or indirectly derived from such testimony . . . shall be offered against him in any criminal proceeding . . . ." 11 U.S.C. § 25(a)(10).

13 Appellee also argues that § 7(a)(10) would be unconstitutional under *Kastigar* if it were interpreted to provide only use immunity. This contention is without merit. Under the 1969 version of the section, the referee had no power to compel testimony over an assertion of the privilege against self-incrimination; as we read *Kastigar*, it applies only to compelled testimony.

In addition, Dornau cites *United States* v. *Monia*, 317 U.S. 424 (1943), for the proposition that a witness, who testifies under a statute such as the Bankruptcy Act which specifies no procedure for conferring the statutory immunity, automatically receives use and derivative use immunity. We do not agree. *Monia* stands at most for the proposition that the witness automatically receives the immunity provided for by the statute—here in 1969—only use immunity.

reject this argument and decline to follow *Seiffert*, which we think was wrongly decided. In enacting the 1970 amendment as part of the Organized Crime Control Act, Title II, 84 Stat. 926, 929, Congress did not have the remedial purpose, suggested by *Seiffert*, of conferring additional immunity upon witnesses who, like Dornau, had already chosen to testify under a grant of use immunity; rather, Congress intended to achieve "effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege" in order to enable bankruptcy referees for the first time to compel the testimony of witnesses who refused to testify, claiming the privilege. H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970), quoted at 1970 U.S. Code Cong. & Adm. News 4008. Indeed, in *United States* v. *Goodwin*, supra, 470 F.2d at 903-04, the Fifth Circuit itself held that the 1970 amendment does not confer derivative use immunity on testimony given before its effective date but sought to be used thereafter. The unanimous denial of a rehearing en banc in *Goodwin*, id. at 904 (1973), is, in view of the clear conflict with *Seiffert*, a strong indication that *Seiffert's* retroactive application of the 1970 amendment has been overruled sub silentio. Thus, Dornau never did receive derivative use immunity under the 1969 statute, a conclusion we are confident Judge Metzner would have reached had the Government properly presented the issue to him.

Appellee raises one final argument which requires discussion. He maintains that he testified on the "express assurance" that he would receive not only use but also derivative use immunity. Consequently, his argument runs, it would frustrate the policy of the privilege against self-incrimination to allow the Government to take advantage of his misconception of the scope of immunity he would receive by testifying. The argument lacks merit. The rec-

ord shows that the so-called "express assurance" was not an assurance at all.[14] More important, it came not from the referee but from Dornau's own counsel. Dornau's reliance on the erroneous advice of counsel not claimed to be incompetent can hardly operate to convert what was in fact a statutory grant of use immunity into a grant of use and derivative use immunity.

Accordingly, we reverse the judgment below and remand to the district court with instructions to reinstate the indictment.[15]

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14 The only "assurance" Dornau cites is the following statement by his counsel to the referee at the creditors' meeting:

> . . . I wanted the record to show that he is appearing under Section 7-B of the Act because it is our position that thereby the provisions of 7-A-10 cannot be used against him nor could any evidence which is found as the result of testimony.

On its face, this statement is an announcement of a position which Dornau intended to take in any subsequent litigation rather than an "assurance" that he would definitely receive derivative use immunity.

15 In view of our disposition of this appeal, we need not reach other issues raised by the Government, i.e., whether the evidence presented to the grand jury was in fact tainted, cf. *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), and if it was, whether dismissal of the indictment was a remedy within the district court's discretion. The latter is a particularly important issue, which we are reluctant to decide unnecessarily. Before the district court, the Government contended vigorously that dismissal was not a proper remedy, relying on dicta in *Gelbard* v. *United States*, 408 U.S. 41, 60 (1972), and *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966), and on *United States* v. *Piccini*, 412 F.2d 591, 593-94 (2d Cir. 1969), cert. denied, 397 U.S. 917 (1970). Judge Metzner rejected this argument, relying on *United States* v. *McDaniel*, 449 F.2d 832, 835 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972), and on our statement in *Goldberg* v. *United States*, 472 F.2d 513, 516 n.4 (2d Cir. 1973), that the dictum in *Blue* did not settle the issue. 356 F. Supp. at 1099-1100. It may be, however, that the Supreme Court's recent decision in *United States* v. *Calandra*, 42 U.S.L.W. 4104 (U.S. Jan. 8, 1974), which holds that the fourth amendment exclusionary rule does not apply to grand jury proceedings, resolves the issue in the Government's favor. The *Calandra* Court observed in dictum:

> [A]n indictment valid on its face is not subject to challenge . . . even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. . . .

Id. at 4106.

APPENDIX C

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January one thousand nine hundred and seventy-four.

Present:

HON. STERRY R. WATERMAN,

HON. WILFRED FEINBERG,

Circuit Judges,

HON. MURRAY I. GURFEIN,

District Judge

United States of America, Plaintiff-Appellant, v. Fred Dornau, Peter Dornau, and Ra-Dor Industries, Defendants-Appellees.	73-2204

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED, JANUARY 24, 1974
A. DANIEL FUSARO, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1390

PETER DORNAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the court of appeals erred in reinstating an indictment alleging that he violated 18 U.S.C. 1341 and 1343, because the government failed to prove that the testimony it offered before the grand jury was untainted by its knowledge of petitioner's prior testimony given under a grant of immunity pursuant to the Federal Bankruptcy Act, 11 U.S.C. 25(a)(10).

Prior to trial, the United States District Court for the Southern District of New York dismissed fifteen counts of an indictment charging petitioner, Fred Dornau[1] and Ra-Dor Industries, Inc., with using the United States

[1]Fred Dornau entered a plea of guilty to half the counts that remained in the original indictment. The government agreed not to prosecute him on the counts that were dismissed and consequently did not appeal the district court's decision insofar as it related to him.

mails and using wire communications in interstate commerce in furtherance of a scheme to defraud investors in Ra-Dor, in violation of 18 U.S.C. 1341 and 1343. The government appealed this order to the court of appeals, which reversed the decision of the district court and ordered that the counts in question be reinstated (Pet. App. B; 491 F. 2d 473).

Petitioner was vice-president of Ra-Dor Industries, a defense contractor in bankruptcy. In May 1969, he testified in the federal district court in Florida at the first meeting of Ra-Dor's creditors. He was indicted five months later in the Southern District of New York on 15 counts of mail and wire fraud involving a scheme to defraud Ra-Dor's investors. Petitioner moved for permission to inspect the grand jury minutes and was accorded leave to do so. 356 F. Supp. 1091, 1097-1098. Petitioner then moved for a hearing to determine whether his prior testimony at the meeting of creditors had been used improperly by the government either before the grand jury or in preparing for trial.

The district court's examination of the evidence presented to the grand jury revealed that the Assistant United States Attorney then in charge of the Dornau prosecution had sought and obtained a transcript of the bankruptcy testimony less than a month before commencing presentation of his case to the grand jury. While petitioner was unable to specify any particular instance of taint, the district court, apparently assuming that petitioner had been compelled to testify (Pet. App. A, A-11), held that "the prosecutor may have made derivative use of the testimony in a variety of ways and that the Government had not met its burden of proving freedom from taint." Pet. App. B, A-21; 491 F. 2d at 477. The district court granted petitioner's motion to dismiss the indictment (Pet. App. A; 359 F. Supp. 684).

1. Petitioner contends that, since he testified before a referee in bankruptcy under an automatic grant of immunity pursuant to 11 U.S.C. 25(a)(10),[2] information derived from his testimony could not be introduced before the grand jury. This contention is without merit. While petitioner did testify before a referee in bankruptcy and thereby automatically received the benefit of the immunity grant of 11 U.S.C. 25(a)(10), the immunity granted was limited to use immunity and did not extend to derivative use immunity. Whatever limitations might exist on the use of petitioner's bankruptcy testimony itself in subsequent criminal proceedings, information derived from the testimony was properly admissible before the grand jury. As the court of appeals stated (Pet. App. B, A-25-A-27; 491 F. 2d at 479; footnotes omitted):

> [W]e hold that Dornau received only use immunity in the bankruptcy proceeding and that consequently the Government's alleged derivative use of his testimony was not improper. Section 7(a)(10) of the Bankruptcy Act, as it stood in 1969, conferred only use immunity. It was so worded and had been so interpreted by the Supreme Court. *Arndstein* v. *McCarthy*, 254 U.S. 71, 73 (1920); see 1A Collier on Bankruptcy para. 7.21 at 1013-15. Because use immunity is not coextensive with the privilege against self-incrimination, *Counselman* v. *Hitchcock*, 142 U.S. 547, 564-65 (1892), section

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[2] At the time of petitioner's testimony, that section provided, in pertinent part:

> (a) The bankrupt shall * * * (10) * * * submit to an examination * * *; but no testimony * * * given by him shall be offered in evidence against him in any criminal proceeding * * *.

7(a)(10) could not have been used in 1969 to compel a bankrupt's testimony over an assertion of his fifth amendment privilege. *Arndstein, supra*, 254 U.S. at 73. Consequently,

> * * * the witness faced two alternatives under the [1969] version of the statute: he could choose to testify freely and then later claim whatever protection the statute afforded; or he could refuse to testify on the grounds that the answers sought might be incriminating.

United States v. *Goodwin*, 470 F. 2d 893, 904 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973). The record in this case indicates that Dornau was informed by the referee of his constitutional right to refuse to testify, and that, without compulsion, he nonetheless chose to testify, relying on the immunity granted by the Act. Such conduct hardly supports Dornau's claim that he received derivative use immunity.

Even if petitioner's assertion that he was compelled to testify were correct, the introduction before the grand jury of information derived from his testimony would not have been grounds for dismissal of his indictment.[3] In *United States* v. *Calandra*, No. 72-734, decided January 8, 1974, this Court held that the fact that evidence is illegally obtained does not preclude its introduction

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[3]As noted above, the court of appeals found that petitioner was not compelled to testify. Although petitioner appeared before the referee in bankruptcy pursuant to order, the referee informed petitioner that he had a right to invoke his privilege against self-incrimination. Petitioner's counsel stated his views as to the scope of the immunity conferred by 11 U.S.C. 25(a)(10) (Pet. App. B, A-26), but his erroneous conclusions were not binding on the government.

before the grand jury. In the course of the opinion, the Court specifically observed that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination * * *" (slip op. 6). 6).

2. Petitioner also contends that this Court should grant certiorari to resolve a conflict in the circuits as to the extent of immunity provided by the version of 11 U.S.C. 25(a)(10) in effect in 1969. In support of this argument petitioner, citing *United States* v. *Seiffert*, 463 F. 2d 1089 (C.A. 5), asserts that the Second and Fifth Circuits are in conflict. No such conflict in fact exists. The *Seiffert* case held that the 1970 amendment[4] to the Bankruptcy Act, providing derivative use immunity, applies to all cases pending when the amendment became effective. However, as the court below noted (Pet. App. B, A-28), the *Seiffert* decision has been overruled *sub silentio* by the Fifth Circuit in its later decision in *United States* v. *Goodwin*, 470 F. 2d 893, rehearing denied, 470 F. 2d 904, certiorari denied, 411 U.S. 969. Like petitioner, Goodwin testified prior to the effective date of the amendment, and his trial commenced after that date. Although all of the government's case at trial was derived from testimony by Goodwin, who had acquired immunity pursuant to 11 U.S.C. 25(a)(10),

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[4]Act of October 15, 1970, 84 Stat. 929. As amended in 1970, 11 U.S.C. 25(a)(10) provides that no testimony "or any evidence which is directly or indirectly derived from such testimony * * * shall be offered against [the witness] in any criminal proceeding * * *."

the court of appeals affirmed the conviction. Thus, the circuits are in accord.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[5]Petitioner further alleges that the court of appeals was without jurisdiction to consider the government's appeal. The court correctly found that pursuant to the 1948 version of the Criminal Appeals Act, 62 Stat. 844, the government could appeal a decision "sustaining * * * a plea in abatement." We rely on the court's holding that the order dismissing the indictment constituted a plea in abatement, thereby vesting it with jurisdiction (Pet. App. B, A-21-A-22; 491 F. 2d at 477).

DOJ-1974-06

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1390

PETER DORNAU, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. As noted in the petition and the memorandum in opposition, there is dictum in United States v. Calandra, 414 U.S. 338,

345-46, that an indictment based on testimony obtained in violation of the Fifth Amendment is nevertheless valid. However the dismissal in the instant case was not based, as the government suggests, merely upon the sources of the evidence used to secure the indictment (memorandum in opposition pp. 1, 3, 4). The trial court also made findings with respect to the evidence the government proposed to use on the trial (Pet. App. A-4).

Indeed the hearing in the trial court was expanded specially for that purpose, in light of Kastigar v. United States, 406 U.S. 441 (A4-7). The trial court found, at the conclusion of the hearing, that Petitioner's coerced testimony could have been used in a variety of ways in the course of the prosecution (A-15). The dismissal followed from the rule of Kastigar that the government

must prove that "all of the evidence it proposes to use" was obtained from legitimate sources, and that compelled testimony cannot be used "in any respect" (A-6, A-15, this Court's emphasis).

As the dismissal was not based on a finding that the grand jury evidence may have been unlawfully obtained, the dictum in United States v. Calandra does not dispose of the issues raised in the petition for certiorari. On the contrary, the Court stated in Calandra that the government may not use illegally obtained evidence, or information derived from such evidence, in the context of a criminal trial. 414 U.S. at 354.

2. In support of its argument that there is no conflict in the circuits as to the scope of immunity provided by Section 7(a)

of the Bankruptcy Act, 11 U.S.C. 25(a), the government maintains that the Fifth Circuit's decision in United States v. Seiffert, 463 F.2d 1089, was implicitly overruled by its decision in United States v. Goodwin, 470 F.2d 893, cert. denied, 411 U.S. 969.*

It is submitted, although the government relies heavily upon United States v. Goodwin in its memorandum in opposition, that the issues in this case were not decided in the Goodwin case. The decision in Goodwin turned on the defendant's failure to assert immunity and the absence of "some affirmative granting of immunity by the person taking the testimony***". 470 F.2d at 903-04. In the instant case, Petitioner did assert

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* To our knowledge, the second appeal in Seiffert, argued in the Fifth Circuit on February 5, 1974, has not been decided.

immunity, - from direct and indirect use of his testimony. The referee in bankruptcy who took Petitioner's testimony indicated that Petitioner did have immunity under the Bankruptcy Act, because he was "compelled to come to Court and testify."

Respectfully submitted,

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